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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS BRAXTON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a defendant has entered a guilty plea "containing a stipulation that specifically establishes a more serious offense than the offense of conviction," according to United States Sentencing Guideline section 1B1.2(a), when he (1) refuses to enter into a plea agreement of any kind, (2) expressly denies committing the more serious offense, and (3) merely agrees with a factual proffer that is not designated as a stipulation but is offered by the government as the factual basis for his guilty pleas to two lesser offenses.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 903 F.2d 292 (4th Cir. 1990). J.A. 86-101. The opinion of the district court is not reported. The district court's oral ruling is set forth in the transcript of sentencing dated July 21, 1989. J.A. 76-78.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1990. J.A. 86. A petition for writ of certiorari was filed on August 3, 1990, and was granted on November 13, 1990. J.A. 105. The jurisdiction of this Court rests on 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The verbatim pertinent text of the following constitutional provision and guidelines is contained in the appendix to the brief:

1. U.S. Const. amend. V.

2. United States Sentencing Commission, *Guidelines Manual*, (June 15, 1988), §§ 1B1.2 and 6B1.4 [hereinafter U.S.S.G.].

STATEMENT OF THE CASE

Thomas Braxton was charged in a three count indictment with (1) an attempt to kill deputy United States marshals in violation of 18 U.S.C. section 1114 (count one); (2) assault on deputy United States marshals in violation of 18 U.S.C. section 111 (count two); and (3) use of a handgun during a crime of violence in violation of 18 U.S.C. section 924(c) (count three). J.A. 2-3. On August 17, 1988, Mr. Braxton pleaded not guilty to all three charges.

On May 23, 1989, during a hearing conducted in accordance with Rule 11 of the Federal Rules of Criminal Procedure, Mr. Braxton pleaded guilty to the assault and handgun charges (counts two and three). J.A. 5. He persisted in his not guilty plea to attempted murder (count one). J.A. 5. Mr. Braxton did not enter into a written or oral plea agreement with the government. J.A. 4. Throughout the Rule 11 hearing, both parties agreed, and the district judge found, that no plea agreement of any kind existed. J.A. 4, 13, 19. During the Rule 11 hearing, the district judge reviewed with Mr. Braxton the elements of counts two and three and the maximum penalties for those offenses. J.A. 7. The district judge inquired into the factual basis for Mr. Braxton's guilty pleas to counts two and three. J.A. 16. The government proffered that it would have been prepared to prove the following facts if the case had proceeded to trial.

In 1974, Mr. Braxton was confined to Saint Elizabeths Hospital in Washington, D.C., pursuant to a United States District Court order finding him not guilty of bank robbery by reason of insanity.[1] In June, 1988, the United States Marshal's Service for the District of Columbia was dispatched to arrest Mr. Braxton on a warrant charging him with unauthorized leave from Saint Elizabeths Hospital. The government also would have proved that:

> [O]n June 10th, 1988, at approximately 7:00 a.m., four Deputy U.S. Marshals named Sherry, Cor-

[1] At the time of these alleged crimes, Mr. Braxton was on unauthorized leave from the care and supervision of Saint Elizabeths Hospital in the District of Columbia. Nevertheless, he was unable to present an insanity defense to the charges because Congress had eliminated the irresistible impulse insanity defense from federal law in the Insanity Defense Reform Act of 1984. P.L. 98-473, 98 Stat. 2057 (1984) (codified as amended at 18 U.S.C. § 20 (1988)).

> ruthers, Kelly and Jenkins went to Mr. Braxton's address at 4301 Eastern Avenue and confirmed that Mr. Braxton resided at Apartment Number 3. At approximately 7:00 a.m., Deputy Jenkins knocked on Apartment 3 and received no response; however, he could hear movement coming from inside the apartment. Deputy Jenkins again knocked, identified himself as a United States Marshal, and advised Mr. Braxton that he had a warrant for his arrest. Again, there was no response from Mr. Braxton. At approximately 7:30 a.m., Deputy Jenkins unlocked the door with keys that had been provided to him by the maintenance staff at the apartment building. Deputy Jenkins again knocked, identified himself as a United States Marshal, and announced his purpose in being there. Deputy Jenkins, who was standing directly in front of the apartment door, opened the door and found that there was a security chain locking it, and so he could only crack it open. At that point, Deputy Jenkins kicked the door open, and contemporaneous with the door opening, a gunshot was fired through the door opening. The gunshot lodged in the front door just above the doorknob. That's the outside of the front door. The four Deputy U.S. Marshals were all located either in front of or next to the front door which had been opened and through which the gunshot had been fired. After several moments, Deputy Jenkins again announced himself, and kicked the door open. The door had snapped shut between the first two attempts to open it. When he kicked it open a second time, a second gunshot was fired again through the door opening. The second bullet lodged approximately five feet high in the door; that's from the floor up to the ceiling. And it was located in the middle of the door about where Deputy Jenkins had been standing.

J.A. 16-18.

The marshals withdrew to a protected position and Mr. Braxton shouted that he was not going to return to Saint

Elizabeths and that he would kill the marshals if they entered the apartment to arrest him. J.A. 18. After a police crisis intervention team arrived on the scene, Mr. Braxton stated that he wanted the team members to come in and get him and that he wanted to kill them. J.A. 18. Although Mr. Braxton fired two additional shots, the government had no evidence that those shots were fired at anyone. J.A. 18. After being advised of his *Miranda* rights, Mr. Braxton stated that he knew United States Marshals were knocking on his door, and that he fired at them because he did not want to return to St. Elizabeths Hospital. J.A. 18.

Following this factual proffer, counsel for Mr. Braxton pointed out that the two shots that hit the door were fired when Deputy Jenkins kicked the door open the first time. J.A. 19. Subject to this correction and another correction regarding recovery of the firearm, counsel for Mr. Braxton acknowledged that the statement of facts was accurate. J.A. 19. Mr. Braxton responded affirmatively when the district judge asked him: "And you admit that you did what the Government says it could prove you could do?" J.A. 19. Counsel for Mr. Braxton explained, however, that "[y]ou can gather from Mr. Braxton's position, and probably from [the government's] statement of facts, that Mr. Braxton admits he assaulted someone and used a handgun, but, obviously, is not admitting he attempted to specifically murder anyone." J.A. 22. The district judge ruled that Mr. Braxton entered the pleas voluntarily "knowing, essentially, that there is no plea agreement." J.A. 19. The district judge accepted the guilty pleas to counts two and three, ordered the preparation of a presentence report, and scheduled a sentencing hearing. J.A. 24-26.

Mr. Braxton appeared before the court for sentencing on July 21, 1989. Because the case arose after November

1, 1987, the Sentencing Reform Act of 1984[2] and the United States Sentencing Guidelines promulgated by the United States Sentencing Commission governed imposition of sentence. Prior to the sentencing hearing, a disagreement arose between the parties over the determination of the offense guideline most applicable to the aggravated assault offense (count two). There was no dispute that (1) aggravated assault carried a base offense level of fifteen, as set forth in Sentencing Guideline section 2A2.2, and (2) attempted murder carried a base offense level of twenty under Sentencing Guideline section 2A2.1. The government, however, argued that pursuant to Sentencing Guideline section 1B1.2 (Applicable Guidelines), the court should disregard the base offense level for aggravated assault and use the higher base offense level of twenty for attempted murder, even though Mr. Braxton had pleaded not guilty to that offense. J.A. 55-59. The presentence report adopted the government's position: "Since there is no plea agreement as to the stipulation in this matter, the Government has indicated that the Court should apply a higher base offense level for the more serious offense of Attempted Murder pursuant to Sentencing Guidelines Section 1B1.2." J.A. 31.

The defendant filed objections to the presentence report, contending that Sentencing Guideline section 1B1.2 did not permit use of the higher base offense level of twenty because Mr. Braxton had not entered into a stipulation to the more serious offense as expressly required by guideline section 1B1.2. J.A. 42-47, 50-52. Counsel for Mr. Braxton urged the court to apply the base offense

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[2] Sentencing Reform Act of 1984, P.L. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586, 3621-3625, 3742 (1988) and 28 U.S.C. §§ 991-998 (1988)).

level of fifteen applicable to aggravated assault as set forth in Sentencing Guideline section 2A2.2. J.A. 63-64.

Mr. Braxton's application of the guidelines, together with certain adjustments and his criminal history category of II, produced an adjusted offense level of thirteen and a guideline imprisonment range of fifteen to twenty-one months for the aggravated assault. Specifically, the defense began the guidelines calculation with a base offense level of fifteen for aggravated assault under Sentencing Guideline section 2A2.2, applied no increase for "official victim" under guidelines section 3A1.2, and subtracted two levels for acceptance of responsibility under guideline section 3E1.1. J.A. 63-65, 72.

The government's application of the guidelines, along with adjustments and the same criminal history category, resulted in a range of imprisonment of fifty-one to sixty-three months for the aggravated assault. The government began with a base offense level of twenty applicable to attempted murder under Sentencing Guideline section 2A2.1, added three offense levels because the marshals were "official victims" under guideline section 3A1.2, and applied no decrease for acceptance of responsibility. J.A. 58.

During the sentencing hearing, the government emphasized that Mr. Braxton does not "think[] what he did was in reckless disregard for the lives of the U.S. Marshals" and "continues to maintain he never intended to * * * kill anyone." J.A. 62. Mr. Braxton admitted that he "did shoot at the marshals when my door was kicked in, but I was not trying to kill the marshals, harm the marshals. I was—it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's [sic]." J.A. 76.

The district court, in an oral opinion, expressly ruled that "there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77. Nevertheless, the district court decided that the facts "added up" to attempted murder and therefore the court was "compelled to find an offense level twenty."[3] J.A. 77. The court's ruling on the applicable offense level, combined with the district court's other rulings against Mr. Braxton, produced a sentencing range of fifty-one to sixty-three months. The district court imposed a sentence of sixty-three months for assault on federal officers (count two), and a mandatory consecutive sentence of sixty months for the firearm violation (a sentence Mr. Braxton has never challenged). J.A. 76. The sentence for assault on federal officers represented the most severe sentence within the guideline range for attempted murder, the crime to which Mr. Braxton steadfastly had refused to plead guilty. After the district court pronounced sentence, the government moved to dismiss the charge of attempted murder (count one of the indictment). J.A. 79.[4] The district court granted this motion. J.A. 79.

Mr. Braxton appealed his sentence to the United States Court of Appeals for the Fourth Circuit under 18 U.S.C.

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[3] The district judge explained that if he were incorrect with respect to the application of section 1B1.2, then a sentence of sixty-three months for assault on federal officers was justified as an upward departure from the guideline range for aggravated assault under Sentencing Guideline section 1B1.4. J.A. 77. Because the Fourth Circuit affirmed the district court's analysis under guideline section 1B1.2, the court of appeals did not reach the upward departure issue. J.A. 99.

[4] Although the government moved to dismiss count one of the indictment, there was no agreement between the government and Mr. Braxton to this effect. J.A. 13.

section 3742(a). The court of appeals, in a divided opinion, affirmed the sentence with respect to the district court's use of the attempted murder guideline to calculate the base offense level for assault on federal officers. J.A. 86-101. The court of appeals recognized that Mr. Braxton did not enter into a written or oral plea agreement, that there was no agreement of the facts designated to be a stipulation, and that the district judge had ruled that there was no stipulation to attempted murder. J.A. 95, 97. The court of appeals applied a clearly erroneous standard to the district court's ruling that the facts offered as a basis for the guilty plea to assault supported a finding of attempted murder and concluded that this ruling was not clearly erroneous. J.A. 97. The court of appeals adopted a broad interpretation of Sentencing Guideline section 1B1.2, holding that "'stipulation' means an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction." J.A. 98. The court of appeals did not view a stipulation as part of an agreement between the parties, but held instead that a defendant's agreement to the facts "can be interpreted as a stipulation for the purposes of establishing a more serious offense than the offense of conviction under section 1B1.2(a)." J.A. 95.

Because Mr. Braxton had agreed to the government's factual proffer at the Rule 11 hearing, the court found that the district court correctly applied the offense level for attempted murder (count one) under Sentencing Guideline section 1B1.2 rather than the offense level for assault on a federal officer (count two). The dissenting opinion reasoned that an enhanced sentence was improper because a stipulation under Sentencing Guideline section 1B1.2(a) "at least means an agreement between a defendant and the government." J.A. 101.

The court of appeals reversed Mr. Braxton's sentence in part and remanded to the district court because it found that the district court had misunderstood the law relating to acceptance of responsibility under Sentencing Guideline section 3E1.1.[5] J.A. 100. At resentencing, the district court applied a two level reduction for acceptance of responsibility and imposed a sentence of fifty-one months for assault on federal officers (count two). J.A. 103-04. This sentence represents the high end of an offense level twenty-one, criminal history category II. The sentence for the firearm violation (count three) remained unchanged. J.A. 104.

SUMMARY OF ARGUMENT

I. The power to fix the punishment for a federal crime rests with Congress, "and the scope of judicial discretion with respect to a sentence is subject to congressional control." *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). Congress in the Sentencing Reform Act of 1984 directed the United States Sentencing Commission to promulgate sentencing guidelines. These guidelines are binding on federal courts. *Id.* at 367. Because the guidelines have the force and effect of law, a district court is required to sentence a criminal defendant in accordance with those guidelines.

Section 1B1.2 of the guidelines directs the court to determine the applicable offense guideline section based

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[5] The district court had found that Mr. Braxton could not feel remorse for his actions because of his mental illness. J.A. 77-78. Reasoning that rehabilitation required a demonstration of remorse, and that rehabilitation was a necessary component of the acceptance of responsibility reduction, the district court had denied the two level reduction. J.A. 78. The Fourth Circuit ruled that rehabilitation was an irrelevant consideration for section 3E1.1 purposes. J.A. 94.

upon the offense of conviction. U.S.S.G. § 1B1.2(a). A limited exception to this general rule allows a court to determine the applicable offense guideline section based upon a more serious offense than the offense of conviction "in the case of conviction by plea of guilty * * * containing a stipulation that specifically establishes a more serious offense than the offense of conviction * * *." *Id.* Well-settled principles of statutory construction, the legislative history of guideline section 1B1.2, commentary, and case law compel the conclusion that a defendant's acknowledgment of the statement of facts offered by the government at a hearing conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure is not a stipulation within the meaning of section 1B1.2. Rather, a section 1B1.2 stipulation must be negotiated between the parties and must be contained within a plea agreement.

A. The plain and commonly accepted meaning of the term "stipulation" is a bargained for agreement between opposing parties that is entered into voluntarily. In criminal cases, bargained for agreements between the government and a defendant regarding disposition of charges generally take the form of a plea agreement. A concession by one party to facts put forth by another party is not sufficient to establish a stipulation.

The guidelines provide that a plea agreement may be accompanied by a stipulation of facts which in most cases must be in writing. U.S.S.G. § 6B1.4, p.s. and comment. Because guideline section 6B1.4 provides for stipulations to be part of a plea agreement, a section 1B1.2 stipulation similarly should be contained within a plea agreement.

B. In this case, Mr. Braxton entered pleas of guilty to assault on federal officers and use of a handgun during a crime of violence. He did not enter into a plea agreement

with the government. Mr. Braxton maintained his not guilty plea to attempted murder and expressly denied committing that offense. Statements made by Mr. Braxton and his lawyer show his unwillingness to enter into a stipulation to the offense of attempted murder. The district court found that Mr. Braxton had not stipulated to the greater offense of attempted murder. In short, Mr. Braxton did not enter a plea containing a stipulation that specifically established the more serious offense of attempted murder.

C. Commentary accompanying section 1B1.2 and the legislative history of the Sentencing Reform Act of 1984 demonstrate that both Congress and the Sentencing Commission intended that a section 1B1.2 stipulation to a more serious offense be contained within a plea agreement. U.S.S.G. § 1B1.2, comment. (n.1); H. Rep. No. 98-1017, 98th Cong., 2d Sess. 99 (1984). The commentary to section 1B1.2 indicates that the Commission adopted the position set forth in the House Report on the 1984 Act. The House Report expressly states that a court may consider facts establishing a more serious offense than the offense of conviction only when "stipulated as part of a plea agreement."

D. Commentary written by the Honorable William Wilkins, Chairman of the United States Sentencing Commission, Wilkins & Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. Rev. 495, 500 (1990), and developing case law throughout the courts of appeals, *e.g.*, *United States* v. *McCall*, 915 F.2d 811 (2d Cir. 1990), support the proposition that the Sentencing Commission intended a section 1B1.2 stipulation to be a negotiated *quid pro quo* in a plea agreement. Essentially, section 1B1.2 establishes a mechanism for the government to extract a stipulation to a more serious

offense than the offense of conviction to secure application of the offense guideline section for the more serious offense. In exchange, the defendant limits his exposure to the maximum term of imprisonment set forth in the statute defining the offense of conviction.

II. A requirement that a section 1B1.2 stipulation be part of a negotiated plea agreement ensures that a defendant enters his plea knowingly and voluntarily with an understanding of the consequences of the stipulation. Rule 11 of the Federal Rules of Criminal Procedure requires a court to inquire into the impact of a plea agreement on the defendant's willingness to enter a plea of guilty. If a section 1B1.2 stipulation is part of a plea agreement, then the court will be able to determine that the defendant understands the consequences of the stipulation. A requirement that a stipulation to a more serious offense be part of a plea agreement also preserves the value of guilty pleas and plea bargaining to the criminal justice system. Allowing a court to find a stipulation from a defendant's mere acknowledgment of the statement of facts proffered by the government at a Rule 11 hearing injects a great deal of uncertainty into the plea process. A defendant's inability to predict whether he will be subject to sentencing for a more serious offense under section 1B1.2 creates a serious disincentive for a defendant to enter a plea of guilty. The end result will be a reduction in the number of guilty pleas and a concomitant increase in criminal trials.

ARGUMENT

I. GUIDELINE SECTION 1B1.2(A) REQUIRES THAT A BASE OFFENSE LEVEL BE CALCULATED ON THE OFFENSE OF CONVICTION UNLESS THE PARTIES SPECIFICALLY STIPULATE TO A GREATER OFFENSE THAN THAT OF CONVICTION.

A criminal defendant is entitled "to have his sentence correctly determined in accordance with the applicable

law." *United States* v. *Khang*, 904 F.2d 1219, 1222 n.5 (8th Cir. 1990) (quoting *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1239 (4th Cir.), *cert. denied*, 110 S. Ct. 346 (1989)). The sentencing process must satisfy the requirements of due process. *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). The Sentencing Reform Act of 1984 and the Sentencing Guidelines promulgated by the United States Sentencing Commission are the law applicable to Mr. Braxton's case. In sentencing Mr. Braxton, however, the lower courts failed to follow the dictates of section 1B1.2 of the Sentencing Guidelines. Thus, Mr. Braxton was deprived of his right to have his sentence determined under the law.

A. Principles of statutory construction provide a particular understanding of the term stipulation.

A majority of this Court, in upholding the constitutionality of the guidelines, has recognized that the Sentencing Reform Act "makes the Sentencing Commission's guidelines binding on the courts." *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989). The binding nature of the guidelines is evident in the Sentencing Reform Act of 1984. Section 3553 of Title 18 of the United States Code generally requires imposition of a sentence within the guideline range promulgated by the United States Sentencing Commission. 18 U.S.C. § 3553 (1988). A sentence that is not in accordance with the guidelines is subject to reversal on appeal. 18 U.S.C. § 3742 (1988). Thus, the guidelines are rules which "have the force and effect of laws, prescribing the sentences criminal defendants are to receive." *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting). *Cf. Miller* v. *Florida*, 482 U.S. 423, 435 (1987) (Florida sentencing guidelines have the "force and effect of law"). As rules having the force of law, the guidelines should be construed using principles of statutory construction.

Circuit courts across the country have held that the guidelines should be interpreted as statutes and have applied principles of statutory construction when reviewing guidelines sentences or interpreting specific guideline provisions.[6] Moreover, because the guidelines prescribe punishment for offenses against the United States, they are penal statutes which must be construed strictly. *See Huntington* v. *Attrill*, 146 U.S. 657 (1892); *Khang*, 904 F.2d at 1222. One hundred and seventy years ago Chief Justice Marshall observed:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. *Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820). This principle of strict construction is perhaps even more important today in light of "the broad and wide-ranging effects of the new Sentencing Guidelines." *Khang*, 904 F.2d at 1222 n.4.

The language at issue in this case appears in guideline section 1B1.2, as it existed at the time of Mr. Braxton's sentencing in July, 1988:

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[6] *See, e.g., United States* v. *Foreman*, 905 F.2d 1335, 1339 (9th Cir. 1990); *United States* v. *Jimenez*, 897 F.2d 286, 287 (7th Cir. 1990); *Khang*, 904 F.2d at 1222; *United States* v. *Lewis*, 900 F.2d 877, 881 (6th Cir.), *cert. denied*, 111 S. Ct. 117 (1990); *United States* v. *Ogbeide*, 911 F.2d 793, 795 (D.C. Cir. 1990); *United States* v. *Worthy*, 915 F.2d 1514, 1516 (11th Cir. 1990); *United States* v. *Goldbaum*, 879 F.2d 811, 813 (10th Cir. 1989); *United States* v. *Reyes-Ruiz*, 868 F.2d 698, 703 (5th Cir. 1989); *United States* v. *Wickstrom*, 893 F.2d 30, 31 (3d Cir. 1989); *United States* v. *Correa-Vargas*, 860 F.2d 35, 38 (2d Cir. 1988).

> The court shall apply the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense.* * *

U.S.S.G. § 1B1.2(a). More specifically in question is the meaning of the language "plea of guilty * * * containing a stipulation that specifically establishes a more serious offense than the offense of conviction." *Id.* 77.

The guidelines and the Sentencing Reform Act do not explicitly define the term "stipulation." Therefore, the plain meaning of "stipulation" is the starting point for analysis. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917) ("the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms"). *See also Perrin* v. *United States*, 444 U.S. 37, 42 (1979) ("unless otherwise defined, words will be interpreted as taking their ordinary, contemporary common meaning").

The commonly accepted meaning of the term "stipulation" is "[a] material condition, requirement, or article in an agreement. The name given to any agreement made by the attorneys engaged on opposite sides of a cause (especially if in writing), regulating any matter incidental to the proceedings or trial." *Black's Law Dictionary* 1269 (5th ed. 1979). The courts have followed this definition by recognizing that "[t]he essence of a stipulation is an agreement of the parties, albeit a judicially sanctioned one." *United States* v. *Harris*, 542 F.2d 1283, 1297 (7th Cir.

1976).[7] Thus, stipulations are effective only when they are the product of mutual assent.[8]

The courts have not taken lightly the requirement for mutual assent. A simple concession by one party to facts establishing a crime is not sufficient to establish a stipulation. In *Harris*, the defendants offered to stipulate to the existence of a conspiracy. Defense counsel admitted in his opening statement to the jury that a conspiracy existed. The government sought to prove the existence of a conspiracy. Despite the apparent "agreement" between the parties that a conspiracy existed, the Court of Appeals for the Seventh Circuit held that no stipulation existed because no specific agreement to the stipulation appeared on the record. *Harris*, 542 F.2d at 1297. The teaching of *Harris* is clear: the parties must intend to enter into a stipulation; a stipulation may not be implied by the circumstances. *See also Golub* v. *J.W. Gant & Assocs.*, 863 F.2d 1516, 1520 (11th Cir. 1989) (party did not "stipulate" to jury verdict by rejecting the court's offer to resubmit the case to the jury).

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[7] *See also United States* v. *McKinney*, 758 F.2d 1036, 1047 (5th Cir. 1985) (stipulation is akin to a contract where the parties are bound only to the terms actually agreed upon); *Rice* v. *Glad Hands, Inc.*, 750 F.2d 434, 438 (5th Cir. 1985) (stipulation is like a contract).

[8] *See, e.g., Harris*, 542 F.2d at 1297; *United States* v. *McKinney*, 758 F.2d 1036, 1047 (5th Cir. 1985); *James* v. *Wallace*, 533 F.2d 963, 967 n.7 (5th Cir. 1976); *United States* v. *McGregor*, 529 F.2d 928, 931 (9th Cir. 1976).

The Latin root of the term, "stipulatio," is defined as a technical juridical term: a promise given on demand, an engagement, agreement, bargain, covenant, stipulation, obligation. It is synonymous with "pactum," an agreement resulting from a bargain. Lewis & Short, *A Latin Dictionary* 1761 (Clarendon Press, Oxford, 1879) (1969 printing).

The terms "containing" and "specifically" in guideline section 1B1.2 also show that a defendant's mere acknowledgment of the government's statement of facts at a Rule 11 hearing is inadequate to establish a section 1B1.2 stipulation. The language "plea of guilty *** containing a stipulation" implies that the stipulation is incorporated into a plea agreement. Furthermore, the adverb "specifically" indicates that the stipulation must particularize facts with the intent of establishing the more serious offense and explain how those facts constitute the more serious offense.

In addition to examining the plain meaning of a statutory term and the use of that term in a given statute, this Court has considered the meaning of the term in the context of the statute as a whole. *Richards* v. *United States*, 369 U.S. 1, 11 (1962); *United States* v. *Morton*, 467 U.S. 822, 828 (1984). When the same term is used in different sections of a statute, that term should be given a single meaning. *Barnson* v. *United States*, 816 F.2d 549, 554 (10th Cir.), *cert. denied*, 484 U.S. 896 (1987); *ICC Indus., Inc.* v. *United States*, 812 F.2d 694, 700 (Fed. Cir. 1987). The term "stipulation" should therefore be read as meaning the same thing in section 1B1.2 of the Sentencing guidelines as in section 6B1.4 of the guidelines.

Section 6B1.4 of the guidelines makes clear that the Sentencing Commission intended for factual stipulations to be part of a plea agreement. In pertinent part, section 6B1.4 reads:

> (a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing ***
>
> *****

> (c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.[9]

U.S.S.G. §6B1.4, p.s.

The commentary states:

> [b]ecause of the importance of the stipulations and the potential complexity of the factors that can affect the determination of sentences, stipulations ordinarily should be in writing. However, exceptions to this practice may be allowed by local rule. The Commission intends to pay particular attention to this aspect of the plea agreement procedure as experience under the guidelines develops.

U.S.S.G. §6B1.4, p.s., comment. Section 6B1.4 contemplates stipulations only as part of a negotiated plea agreement. Thus, a logical reading of sections 1B1.2 and 6B1.4 together compels the conclusion that the Sentencing Commission intended that a stipulation be established only as part of a plea agreement, especially a written agreement.

In summary, accepted principles of statutory construction show that the term "stipulation" in section

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[9] The Rules of the United States District Court for the District of Maryland provide for oral rather than written stipulations pursuant to plea agreements only in misdemeanor cases: "Pursuant to Section 6B1.4(c) of the Sentencing Guidelines and Policy Statements of the United States Sentencing Commission, a judicial officer taking a plea of guilty or *nolo contendere* pursuant to a plea agreement, for any offense or offenses not above the level of a Class A misdemeanor (which includes all misdemeanors and infractions), may permit the parties to make any required stipulation of facts relative to sentencing orally, on the record, at the time the plea agreement is offered, in lieu of a written stipulation." U.S. Dist. Ct. Local R. 213.3.

1B1.2 of the Sentencing Guidelines refers to a negotiated agreement where the parties bargain for a factual agreement that specifically establishes a more serious offense than the offense of conviction. In Mr. Braxton's case, there was no plea agreement and no factual stipulation.

B. The district court erroneously calculated the base offense level in this case because Mr. Braxton did not enter a guilty plea containing a stipulation that specifically established a more serious offense than the offense of conviction.

In this case, Mr. Braxton did not enter into a stipulation specifically establishing a more serious offense than the offense of conviction. Mr. Braxton pleaded guilty to assault on a federal officer (count two) and use of a firearm during a crime of violence (count three) without entering into a plea agreement of any kind. J.A. 4, 19. He persisted in his plea of not guilty to the charge of attempted murder (count one). J.A. 5. Although the government moved to dismiss the attempted murder charge after sentencing (J.A. 79), no agreement existed that this would be done. J.A. 13. In addition, defense counsel and the government did not negotiate the statement of facts read by the government at Mr. Braxton's Rule 11 proceeding. The factual statement was not designated a stipulation. J.A. 95. The government offered the statement of facts solely as a factual basis for the guilty pleas to counts one and two.

Mr. Braxton steadfastly denied committing the more serious offense of attempted murder. J.A. 76. Shortly after the government presented the facts that it could prove had the case gone to trial, Mr. Braxton's counsel explained that Mr. Braxton was not admitting an attempt to murder anyone. J.A. 22. This denial demonstrates Mr. Braxton's lack of assent to a stipulation establishing attempted murder. Mr. Braxton's lack of assent to a stip-

ulation specifically establishing a more serious offense also is manifest in defense counsel's statement at sentencing that "[i]f Mr. Braxton was really stipulating to the fact that he attempted to murder marshals, he would have pled guilty to attempting to murder marshals." J.A. 75. At sentencing, the district court expressly ruled that there had been no stipulation: "And I realize, and there certainly is no indication, [your lawyer has] made it absolutely clear throughout that, Mr. Braxton, on your behalf, there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77.

C. The legislative history of the Sentencing Reform Act and the Sentencing Guidelines, together with recent commentary, demonstrate that Congress and the Sentencing Commission intended a section 1B1.2 stipulation to be contained within a plea agreement.

The legislative history of the Sentencing Reform Act demonstrates that the guideline applicable to an offense more serious than the offense of conviction does not apply unless the elements of the more serious offense are established as part of a plea agreement. The House Report on the 1984 Act formulated the general rule that penalties must be based strictly on the offense of conviction. The House Report also describes the limited exception to the general rule:

> There is one exception to the restriction on the court's inability to consider facts regarding the offense that were not proved but, if proved, would have established guilt of a more serious offense. Such facts may be considered if stipulated *as part of a plea agreement*. For example, if the defendant pled guilty to theft, but admitted the elements of robbery as part of the agreement, the guideline for robbery could be applied. The sentence, of course, could not exceed the maximum sentence for the theft.

H. Rep. No. 98-1017, 98th Cong., 2d Sess. 99 (1984) (emphasis added). This language reflects congressional intent to restrict the use of a higher offense level to situations involving a negotiated plea agreement.

Section 1B1.2 of the Sentencing Guidelines represents the Commission's adoption of the provisions set forth in the House Report. The Sentencing Commission expressly relied on the House Report in the commentary to guideline section 1B1.2:

> However, there is a limited exception to this general rule. Where a stipulation as part of a plea of guilty or *nolo contendere* specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. *** For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. *See* H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).

U.S.S.G. §1B1.2, comment. (n.1). Thus, the legislative history of the Sentencing Reform Act and the commentary to section 1B1.2 establish that Congress and the Commission intended that the narrow exception to section 1B1.2 apply only to situations in which a plea bargain has been struck.

Recent commentary by the Chairman of the United States Sentencing Commission and the General Counsel to the Commission explains that the stipulation proviso of section 1B1.2 provides "an important but limited exception to the general" rule that the offense of conviction provides the starting point for application of the guidelines. Wilkins & Steer, *Relevant Conduct: The Cor-*

nerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 500-501 (1990). The authors further explain that the stipulation proviso only applies when the defendant expressly agrees to use of the guideline applicable to the more serious charge:

> It is not enough that the defendant simply admit at sentencing to more serious criminal activity than the charged offense proscribes; rather, a *negotiated* quid pro quo as part of a plea of guilty or nolo contendere is contemplated. In such a case, the Government agrees to forego prosecution of a more serious charge in exchange for gaining application of the guideline applicable to the more serious charge. The defendant agrees to the use of that guideline in exchange for limiting his statutory exposure and, perhaps, avoiding other guideline and statutory consequences.

Id. at 501 (emphasis added) (citations omitted).

For example, a defendant may avoid application of the career offender provisions of the guidelines by negotiating a plea to a less serious offense which does not trigger those provisions while stipulating to a more serious offense. *Id.* at 501-02 n.42. The effect is to limit statutory exposure in return for an increase in the base offense level and resulting guideline range. A defendant also may become statutorily eligible for probation by pleading to an offense less than a Class A or B felony, but stipulating to a higher offense. *Id.* at 501-02 n.42.

In contrast to these examples, the stipulation proviso of section 1B1.2 offered no advantages to Mr. Braxton. Whether Mr. Braxton was sentenced pursuant to the guideline for attempted murder (U.S.S.G. § 2A2.1) or that applicable to assault on a federal officer (U.S.S.G. § 2A2.2), the resulting guideline range remained substantially lower than the ten year statutory maximum for the

lesser offense of assault on federal officers. 18 U.S.C. § 111. (The attempted murder charge carried a twenty year statutory maximum under 18 U.S.C. § 1114.) Mr. Braxton had no need for a negotiated quid pro quo, and had nothing to gain from a plea agreement which could have resulted in a stipulation to the greater offense of attempted murder. Because Mr. Braxton's case did not involve a negotiated quid pro quo as part of a plea agreement, the stipulation proviso of section 1B1.2 should not have been triggered.

In this case, the parties agreed, and the lower court found, that there was no plea agreement. J.A. 4, 13, 19. The ruling of the court of appeals that Mr. Braxton had entered into a stipulation in the absence of a plea agreement is inconsistent with the intent of Congress and the Sentencing Commission regarding the operation of guideline section 1B1.2.

D. Developing case law under the Sentencing Guidelines interprets "stipulation" as used in section 1B1.2 as a formal agreement between the parties.

Several courts of appeals have construed the term stipulation in section 1B1.2. The Second, Fifth, and Tenth Circuits have recognized that the Sentencing Commission must have intended a stipulation under section 1B1.2 to be part of a plea agreement between the parties, rather than merely an acknowledgment of a recitation of facts during a Rule 11 or sentencing hearing. *See, e.g., United Staes* v. *McCall*, 915 F.2d 811, 816 n.4 (2d Cir. 1990); *United States* v. *Rutter*, 897 F.2d 1558, 1561 (10th Cir.), *cert. denied*, 111 S. Ct. 88 (1990); *United States* v. *Strong*, 891 F.2d 82, 85 (5th Cir. 1989); *United States* v. *Warters*, 885 F.2d 1266, 1273 n.5 (5th Cir. 1989); *United States* v. *Guerrero*, 863 F.2d 245, 248 (2d Cir. 1988).

The Second Circuit requires "that any stipulation be a part of the plea agreement, whether oral or written." *McCall*, 915 F.2d at 816 n.4. In *McCall*, the defendant, pursuant to a plea agreement, pleaded guilty to aggravated assault (in aid of racketeering). *Id.* at 812. Under the plea agreement, he agreed to admit to the court his participation in four shootings. *Id.* Based on the facts admitted by the defendant at the Rule 11 hearing, the court concluded that the defendant had "acted with a 'depraved indifference to human life'" and determined the applicable guideline range under the more severe guideline for assault with intent to commit murder rather than the guideline for aggravated assault. *Id.* at 813. On appeal, the Second Circuit reversed because the district court improperly based the applicable guideline section on the defendant's real conduct rather than the offense to which he pleaded guilty pursuant to a written plea agreement with the government. *Id.* at 814.

The appellate court declined to find a stipulation in part because of the importance of the reasonable expectations of the parties. These expectations cannot be fulfilled "unless the Guidelines section is determined solely on the basis of the offense of conviction, facts alleged in the information or indictment, and formal stipulations to facts establishing a more severe offense." *Id.* at 815. Because the government had failed to extract a section 1B1.2 stipulation during plea negotiations, the *McCall* court ruled that the defendant's "agreement to describe the four assaults at the time of his plea allocution does not constitute a stipulation to more severe offense conduct." *Id.* *McCall's* clear implication is that a stipulation under section 1B1.2 must be labelled as such.[10]

[10] The Fourth Circuit relied on *United States* v. *Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988), in concluding that a defendant's agreement to a statement of facts offered at a Rule 11 hearing qualifies as a section 1B1.2 stipulation. *Correa-Vargas* is inapposite because the decision does not rest on application of section 1B1.2. Instead, the opinion affirms an upward departure and merely mentions section 1B1.2 in dicta.

The Fifth Circuit has stated with equal clarity that a defendant's admission to facts recited by the government at the Rule 11 hearing is not a stipulation within the meaning of section 1B1.2. *Warters*, 885 F.2d at 1273 n.5. In *Warters*, the defendant, pursuant to a plea agreement, pleaded guilty to misprision of a felony. The plea agreement said nothing about the defendant's membership in a conspiracy to distribute controlled illegal substances. At the Rule 11 hearing, however, the defendant admitted to facts showing that he was a member of the conspiracy. The court ruled that the case did not involve "a stipulation * * * specifically establishing a more serious offense." *Id.* The court noted: "Warter's guilt of misprision of the conspiracy did not depend on his having been a member of the conspiracy; nor was there any formal stipulation of his guilt of conspiracy." *Id.*

In short, the circuit courts of appeals have reasoned that the stipulation contemplated under section 1B1.2 is a formal agreement between the government and the defendant. An agreement to the statement of facts recited by the government at a Rule 11 hearing cannot substitute for the formal stipulation contemplated by section 1B1.2.

II. A REQUIREMENT THAT A STIPULATION BE PART OF A NEGOTIATED PLEA AGREEMENT FURTHERS IMPORTANT GOALS OF THE CRIMINAL JUSTICE SYSTEM.

A requirement that a section 1B1.2 stipulation be part of a negotiated plea agreement serves two purposes which

are essential to the fair and efficient operation of the criminal justice system. First, it ensures that a defendant enters his plea knowingly and voluntarily with an awareness of the consequences of the stipulation. Second, it preserves the value of guilty pleas and plea bargaining to the criminal justice system.

The conclusive nature of a stipulation mandates that a defendant understand the nature and consequences of the stipulation. A stipulation is a concession that some alleged fact is true. "Stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them." *Osborne* v. *United States*, 351 F.2d 111, 120 (8th Cir. 1965). A stipulation containing all of the facts necessary to determine guilt is invalid unless the defendant "knew what he was doing and understood the consequences of his stipulation." *United States* v. *Stalder*, 696 F.2d 59, 62 (8th Cir. 1982).[11]

Rule 11 of the Federal Rules of Criminal Procedure establishes a procedure to ensure that a defendant enters a plea knowingly and voluntarily with an understanding of the effect of any agreements or stipulations with the government. Rule 11(d) mandates an inquiry by the court into the impact of plea discussions on the defendant's willingness to plead guilty. Furthermore, under Rule 11(e), the plea agreement must be disclosed in open court. If the section 1B1.2 stipulation to a more serious offense is

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[11] *See also United States* v. *Lyons*, 898 F.2d 210, 215 (1st Cir.), *cert. denied*, 111 S. Ct. 285 (1990) (district judge must make special effort to establish that waiver is knowing and voluntary and to impress upon the defendant the significance of the choice to proceed by stipulation); *Cox* v. *Hutto*, 589 F.2d 394, 395-96 (8th Cir. 1979) (stipulation without defendant's consent resulting in sentencing enhancement after guilty finding invalid).

contained within a plea agreement, then these Rule 11 inquiries will ensure that the defendant is aware of the existence and effect of the stipulation. Moreover, the Rule 11 proceeding will uncover the impact of the stipulation on the defendant's entry of a knowing and voluntary plea.

Because of the procedures followed in this case, there is no assurance that Mr. Braxton knew that admitting the facts proffered in support of his guilty plea to assault while denying guilt of attempted murder could have the effect of a section 1B1.2 stipulation subjecting him to punishment for attempted murder. Even the district court did not view Mr. Braxton's agreement to the statement of facts offered in support of the plea to assault as a section 1B1.2 stipulation to the more serious offense of attempted murder. The court ruled that "there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77. Nevertheless, the district court treated the facts for sentencing purposes as the practical equivalent of a guilty plea to attempted murder, because in the court's view the facts "added up" to that offense. J.A. 77. The judicial finding of a stipulation was not made until the case reached the court of appeals. J.A. 98-99. Therefore, it is not surprising that the district judge never inquired whether Mr. Braxton understood the consequences of the supposed stipulation.

The record shows that Mr. Braxton did not agree to the government's statement of facts knowing that his agreement would have the consequence of a stipulation to attempted murder. To the contrary, Mr. Braxton's unwillingness to agree to such a stipulation is shown by his lawyer's statement that Mr. Braxton "obviously, is not admitting he attempted to specifically murder anyone." J.A. 22. Braxton himself emphatically stated that "I was not trying to kill the marshals, harm the marshals. I was

—it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's [sic]." J.A. 76. These statements negate any purpose on Mr. Braxton's part to enter a guilty plea which subjected him to sentencing based on a crime that was neither proved at trial nor admitted by him. *Cf. Brookhart* v. *Janis*, 384 U.S. 1, 5-8 (1965) (petitioner did not knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea where he expressed his desire to plead not guilty).

In addition to ensuring that a defendant understands the nature and consequences of a section 1B1.2 stipulation, a requirement that a stipulation be contained within a negotiated plea agreement would reduce the risks and uncertainties that the Fourth Circuit's decision has injected into the plea process. The criminal justice system has come to depend upon pleas of guilty. Fed. R. Crim. P. 11 advisory committee's note to 1974 amends. Few would dispute that guilty pleas are essential to the efficient operation of the criminal justice system. *See Santobello* v. *New York*, 404 U.S. 257, 260 (1971). The Fourth Circuit's opinion in this case, however, establishes law that may result in the complete breakdown of the plea process.

The Fourth Circuit encourages district courts to scrutinize the statement of facts offered in support of a guilty plea to a lesser offense and to draw inferences from those facts to determine whether they establish a more serious offense. The Fourth Circuit's opinion, however, provides no guidance to district courts regarding the procedures to be followed or the standard of proof required for determining that a more serious offense has been established.[12]

[12] The failure of the court of appeals to delineate a standard for determining whether a stipulation specifically establishes a more serious offense presents an unacceptable risk that a defendant will be sentenced for an offense that he did not commit. The Fifth Circuit in *United States* v. *Martin*, 893 F.2d 73, 75 (5th Cir. 1990), recognized this risk associated with a section 1B1.2 stipulation. Thus, the Fifth Circuit requires the district court to follow the directive of Rule 11(f) and determine that the stipulated conduct constitutes a crime. *Id.*

In Mr. Braxton's case, although the district court's conclusion that the facts "added up" to attempted murder involved a crucial inference as to Mr. Braxton's state of mind, the court of appeals' opinion subjected this finding to review under a clearly erroneous standard. J.A. 97.

The dangers of the Fourth Circuit's unstructured approach to determining whether a stipulation specifically establishes a more serious offense are most evident in cases where crimes of varying levels of severity are based upon the same acts, separated only by different mental states. For example, a defendant who is charged with voluntary manslaughter may plead guilty as charged only to have the district court decide that the facts add up to second degree murder and therefore apply the higher base offense level applicable to second degree murder. Similarly, the court of appeals' opinion would permit a defendant who pleads guilty to bank larceny to receive a guideline sentence for bank robbery under section 1B1.2 if the court found a taking by intimidation. As a result, the defendant would be sentenced according to the more severe sentencing guideline applicable to an uncharged and unproved greater offense. Such a system defeats congressional goals in the Sentencing Reform Act of 1984 to "structure judicial sentencing discretion *** and make criminal sentencing fairer and more certain." S. Rep. No. 225, 98th Cong., 2d Sess. 65, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3248.

As a practical matter, the Fourth Circuit's opinion forces the defendant into making an immediate assessment of the facts proffered by the government at a Rule 11 hearing without having had a previous opportunity to review those facts. Yet, acknowledging a statement of facts at a Rule 11 hearing may have serious and irreparable consequences for a defendant. Under such circumstances, a defendant will be reluctant to enter a guilty plea for fear that the district court will find that he "stipulated" to a more serious offense, thus subjecting him to sentencing according to a higher offense level. If the stipulation were part of a plea agreement, however, the defendant would have an adequate opportunity to review the stipulation in advance of the Rule 11 hearing and could assess its potential impact.

The Fourth Circuit's opinion also allows a district court to apply the stipulation proviso of section 1B1.2 in a wide variety of circumstances, regardless of whether the parties intended to enter into such a stipulation. The opinion permits a prosecutor to avoid an express discussion of the elements of a more serious offense during plea negotiations or during the Rule 11 hearing. Later, however, the prosecutor may urge the probation office and the district court to infer guilt of a greater offense from the facts offered at the Rule 11 hearing. The prosecutor then could obtain application of a more severe offense guideline based on section 1B1.2 without the defendant's agreement and without meeting the higher burden of proof associated with a trial. Thus, the absence of a requirement that stipulations be part of a negotiated plea agreement could result in fundamental misunderstandings about the value of a plea bargain and could destroy the integrity of the plea bargaining process.

Furthermore, the opinion of the court of appeals creates insurmountable barriers for a defendant who wishes to

avoid the effect of a section 1B1.2 stipulation. Mr. Braxton and his attorney denied the more serious offense of attempted murder, but the appellate court found this denial insufficient to negate a section 1B1.2 stipulation to the greater offense of attempted murder. A defendant's inability to avoid a stipulation to a more serious offense may eliminate the incentive to enter a guilty plea. On the contrary, he may have no choice but to plead not guilty to lesser offenses for fear of being sentenced for a greater offense. In this situation, a defendant risks little or nothing by standing trial. The end result will be a reduction in the number of guilty pleas and a concomitant increase in criminal trials.[13]

In conclusion, a requirement that a section 1B1.2 stipulation be part of a plea agreement would ensure that a defendant understands the nature and consequences of the stipulation and would safeguard the fundamental value of guilty pleas in the criminal justice system.

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[13] The court of appeals' opinion also raises a host of other problems under the Sentencing Guidelines. For example, it is unclear whether a defendant must accept responsibility for the greater offense to which he has stipulated in order to gain a two level offense level reduction under guideline section 3E1.1. If the defendant expressly has entered into a stipulation with the government establishing a greater offense as part of a negotiated quid pro quo, then it would be fair to require him to accept responsibility for the conduct underlying the greater offense. If, however, a stipulation is not required to be part of a negotiated plea agreement, then the defendant may be denied a reduction in the offense level merely because he has not accepted responsibility for the greater offense. Because the determination that there has been a stipulation within the meaning of section 1B1.2 often would not take place until the sentencing hearing, the denial of credit for acceptance of responsibility likely would occur in cases where a stipulation was not part of a negotiated plea agreement.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and the case should be remanded for resentencing in conformity with Sentencing Guideline section 1B1.2.

Respectfully submitted,

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APPENDIX

APPENDIX

U.S. Const. amend. V

"No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

United States Sentencing Guidelines[1]

§ 1B1.2. *Applicable Guidelines*

(a) The court shall apply the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty * * * containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense. Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses.

Commentary

Application Notes:

1. This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). As a general rule, the court is to apply the guideline covering the offense conduct most applicable to the offense of conviction. Where a particular statute proscribes a variety of conduct which might constitute the subject of different guidelines, the court will decide which guideline applies based upon the nature of the offense conduct charged.

   However, there is a limited exception to this general rule. Where a stipulation as part of a plea of guilty or *nolo contendere* specifically establishes facts that

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[1] United States Sentencing Commission, *Guidelines Manual* (June 15, 1988).

prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. The sentence that may be imposed is limited, however, to the maximum authorized by the statute under which the defendant is convicted. *See* Chapter Five, Part G (Implementing the Total Sentence of Imprisonment). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. *See* H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984). Similarly, if the defendant pleads guilty to one robbery but admits the elements of two additional robberies as part of a plea agreement, the guideline applicable to three robberies is to be applied.

The exception to the general rule has a practical basis. In cases where the elements of an offense more serious than the offense of conviction are established by the plea, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea. The probation officer would first be required to calculate the guideline for the offense of conviction. However, this guideline might even contain characteristics that are difficult to establish or not very important in the context of the actual offense conduct. As a simple example, § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), contains monetary distinctions which are more significant and more detailed than the monetary distinctions in § 2B3.1 (Robbery). Then, the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure in a case in which the defendant pled guilty to theft but admitted committing the robbery. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or *nolo contendere* plea cases where it is applicable.

As with any plea agreement, the court must first

determine that the agreement is acceptable, in accordance with the policies stated in Chapter Six, Part B (Plea Agreements). The limited exception provided here applies only after the court has determined that a plea, otherwise fitting the exception, is acceptable.

2. Section 1B1.2(b) directs the court, once it has determined the applicable guideline (*i.e.*, the applicable guideline section from Chapter Two) under § 1B1.2(a) to determine any applicable specific offense characteristics (under that guideline), and any other applicable sentencing factors pursuant to the relevant conduct definition in § 1B1.3. Where there is more than one base offense level within a particular guideline, the determination of the applicable base offense level is treated in the same manner as a determination of a specific offense characteristic. Accordingly, the "relevant conduct" criteria of § 1B1.3 are to be used, unless conviction under a specific statute is expressly required.

3. In many instances, it will be appropriate that the court consider the actual conduct of the offender, even when such conduct does not constitute an element of the offense. As described above, this may occur when an offender stipulates certain facts in a plea agreement. It is more typically so when the court considers the applicability of specific offense characteristics within individual guidelines, when it considers various adjustments, and when it considers whether or not to depart from the guidelines for reasons relating to offense conduct. *See* §§ 1B1.3 (Relevant Conduct) and 1B1.4 (Information to be Used at Sentencing).

§ 6B1.4. *Stipulations* (Policy Statement)

(a) A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing. Except to the extent that a party may be privileged not to disclose certain information, stipulations shall:

(1) set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics;

(2) not contain misleading facts; and

(3) set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate.

(b) To the extent that the parties disagree about any facts relevant to sentencing, the stipulations shall identify the facts that are in dispute.

(c) A district court may, by local rule, identify categories of cases for which the parties are authorized to make the required stipulation orally, on the record, at the time the plea agreement is offered.

(d) The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.